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No.: _____

IN THE

Supreme Court of the United States

October Term, 1981

ROBERT MELLI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 20, 1982

Question Presented

Whether the district court's instruction upon the issue of wrongfulness in this Hobbs Act prosecution was in direct conflict with this Court's holding in *United States v. Enmons*, 410 U.S. 396 (1973)?

Parties to the Proceeding

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Robert Melli, Petitioner herein, and George Zappola.*

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* George Zappola is now deceased.

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ROBERT MELLI,

Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Robert Melli respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto at pp. 1a-11a. The order of the Court of Appeals denying rehearing, appears in the appendix at p. 12a. The opinion rendered by the District Court for the Southern District of New York appears in the appendix at pp. 13a-24a and is reported in *United States v. Zappola*, 523 F.Supp. 362 (S.D.N.Y. 1981).

Jurisdiction

The judgment of the Court of Appeals was entered on April 30th, 1982. A petition for rehearing and suggestion for rehearing *in banc* was denied on June 21st, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rules 20.1 and 20.4 of the Rules of this Court.

Statute Involved

Title 18, United States Code, § 1951, provides as follows:

> § 1951. Interference with commerce by threats or violence
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plain or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years or both.
>
> (b) As used in this section –
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c.645, 62 Stat. 793.

Statement of the Case

Petitioner Melli and a co-defendant George Zappola* were convicted after a jury trial before the United States District Court for the Southern District of New York (Haight, J.) of attempted extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. The instant prosecution was a retrial following a reversal of the convictions by the Court of Appeals upon grounds unrelated to the issue raised herein.**

The defendants were charged in a two-count indictment with conspiring to extort and with attempting to extort money from World Trade Transport, Inc.

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* Now deceased.

** *See United States v. Zappola*, 646 F.2d 48 (2d Cir. 1981).

(hereinafter "World Trade") by the "wrongful use of actual and threatened violence and fear."* The government's theory was that force and violence were actually employed and that threats of further violence were made. The government's principal witnesses in the instant case were William Ross and John Marano, co-owners of World Trade.

The pertinent facts may be briefly summarized. The defendants owned and operated M & R Repair, Inc. (hereinafter "M & R"), which repaired containers and chassis for shipping companies. Its largest client was Japan Line, Inc. In 1976 and 1977, the containers were delivered to M & R by World Trade, the trucking company owned by Marano and Ross. According to Ross, World Trade delivered the containers pursuant to instructions from Japan Line. In early 1977, World Trade stopped delivering containers to M & R, taking them instead to a competing shop, Maher Terminal.

In May of 1977, defendant Zappola began to notice the sharp drop in business in his yard. He called Marano to ask why containers were no longer being delivered to M & R. According to Ross and Marano, on June 6th, 1977, they were summoned to the M & R repair yard by a telephone call. Upon their arrival, the defendants were waiting for them in the back room.

On this occasion, Marano was assaulted by Zappola who repeatedly accused Ross and Marano of stealing his business and causing him a loss of approximately $38,000. Marano further testified that Zappola told Melli to search them and if either of them were wearing a wire, he'd kill them. Ross testified that other than the search for a wire, Melli took no active part in the conversation.

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* The defendants were convicted upon both charges at the conclusion of the first trial. Upon retrial, however, both defendants were convicted of attempted extortion and acquitted of the conspiracy charge.

Before this incident took place, Marano had been cooperating with the F.B.I. He reported this event to the authorities on the following day and subsequently surreptitiously recorded a number of conversations with one or both defendants where they repeated their complaints about the loss of business and demanded the money owed to them. Some of these conversations were introduced into evidence by the government.

The linchpin of the defense, advanced vigorously and consistently at the original trial and the retrial of this Hobbs Act prosecution, was the defendants' claim that whatever actions they took were motivated by their reasonable belief that World Trade actually owed M & R the money they demanded.* This issue sparked a heated debate among counsel and the court on each occasion as it pertained to the appropriate charge on "wrongfulness."

At the first trial, Judge Sand charged, over government objection, that the jury must acquit if it found that the defendants reasonably believed they were legally entitled to the money they demanded from Ross and Marano. Judge Sand charged in this regard:

> ... if you find that the defendant you are considering reasonably entertained a belief that he had a lawful claim to the property or money, then his actions were not wrongful within the meaning of the statute, and you may not convict that defendant of attempted extortion.

In the case at bar, the district court, upon the government's application, made a pre-trial determination

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* Significantly, in this regard, the Court of Appeals noted in its opinion that "there is some evidence that the diversion of Japan Line containers was directed by Marano, whose son-in-law, Joseph DeNicholas, and former employee, Louis Fenza, both worked at Japan Line. Meanwhile, Marano surreptitiously approached Japan Line with a proposal to start a joint venture to do Japan Line's storage and repair work. He had previously discussed a joint venture with Zappola" (Appendix at p. 3a).

that unless a labor union is involved, the use or threat of force or violence brings the case within the Hobbs Act and legal entitlement is, therefore, irrelevant. Accordingly, the court declined to give the charge set out, *supra*, instead charging the jury as follows:

> . . . [i]f you find that the government has proved beyond a reasonable doubt that a particular defendant used or threatened force or violence or attempted to induce fear for the prohibited purpose of obtaining money with his victim's consent, then the element of wrongfulness has been satisfied and in that circumstance it makes no difference whether the defendant was actually owed any money by the victims or thought he was. That is because the law does not permit the use or threat of force or violence or fear induced thereby to collect debts.

Reason for Granting the Writ

The Decision Below Is in Direct Conflict with This Court's Decision in *United States v. Enmons*, 410 U.S. 396 (1973).

The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Petitioner Melli contends that the Act is limited to those situations where the obtaining of the property is rendered "wrongful" by virtue of the fact that the alleged extortionist possesses no lawful claim to the property. The instruction to this effect given at the first trial was, therefore, a correct statement of the law and the court's refusal to so charge in the case at bar constituted reversible error.

Petitioner's argument finds strong support in *United States v. Enmons*, 410 U.S. 396 (1973), where this Court held that the Hobbs Act did not reach the

use of violence by a labor union in its efforts to achieve legitimate union objectives such as higher wages. Reasoning from an analysis of the literal language of the statute itself, this Court concluded that it was the absence of legal entitlement which rendered a defendant's actions "wrongful" within the meaning of the Act. In addition, this Court observed that "wrongful" would be superfluous and redundant if it were interpreted merely to describe the means used since force and violence are inherently wrongful.

In *Enmons*, this Court also cited the legislative history of the Hobbs Act which indicated that Congress did not intend to reach labor violence during a strike. Various courts, including the district court and the Court of Appeals in the case at bar, have focused exclusively upon this aspect of the holding in order to restrict the *Enmons* rationale to the labor union context. These courts have held that *Enmons* simply carved out a labor exception to the traditional law of extortion codified in the Hobbs Act. *See United States v. Porcaro*, 648 F.2d 753 (1st Cir. 1981); *United States v. French*, 628 F.2d 1069 (8th Cir.), *cert. denied*, 449 U.S. 1043 (1980); *United States v. Warledo*, 557 F.2d 721 (10th Cir. 1977).

If the legislative history had wholly resolved the issue presented in *Enmons*, further analysis would have been unnecessary. It would have been a straightforward matter to hold that the Hobbs Act was simply not intended to reach the conduct involved therein. This Court, however, deliberately and specifically carried its analysis much further.

In fact, this Court carefully differentiated between "wrongful" conduct on the part of a labor union which would fall within the proscription of the Act and conduct which was not encompassed by the Act. In this regard, this Court explicitly approved the applicability of the Act to instances where union officials threatened force or violence against an employer in order to

obtain personal payoffs, as well as to situations where unions employed the means proscribed by the Act to exact wage payments from employers in return for fictitious services. 410 U.S. at 400. This Court clearly focused principally upon the defendants' entitlement to that which they sought to obtain rather than their status as labor union members. In summary, if the defendants possessed a lawful claim to that which they sought, this Court determined that their conduct could not be "wrongful" within the meaning of the Hobbs Act.

It is respectfully submitted that certiorari should be granted to clarify the *Enmons* holding and the meaning of "wrongful" within the context of the Hobbs Act.

Conclusion

For all the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit Court of Appeals

Respectfully submitted,

RONALD P. FISCHETTI

Counsel for Petitioner

Anne C. Feigus
Of Counsel

August 20, 1982

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 910, 911 — August Term, 1981
Argued: March 22, 1982 — Decided: April 30, 1982
Docket No. 81-1488, 81-1490

UNITED STATES OF AMERICA,
Appellee,

-against-

GEORGE ZAPPOLA and ROBERT MELLI,
Defendants-Appellants.

Before: LUMBARD and OAKES, *Circuit Judges,* and FRIEDMAN, *Chief Judge, Court of Claims**

The defendants appeal from judgments of conviction for attempted extortion in violation of the Hobbs Act, 18 U.S.C. §§1951 & 2 (1976), entered in the Southern District of New York, Haight, *J.*, presiding.

Affirmed.

ANNE C. FEIGUS, ESQ.
New York, N.Y.
(Ronald P. Fischetti, Esq., New York, N.Y., Of Counsel), for Defendant-Appellant Robert Melli

PAUL B. BERGMAN, ESQ.
New York, N.Y. (LaRossa, Brownstein & Mitchell, New York, N.Y., of Counsel), For Defendant-Appellant George Zappola

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*Honorable Daniel M. Friedman, Chief Judge, Court of Claims, Washington, D.C., sitting by designation.

THOMAS FITZPATRICK, Assistant United States Attorney, New York, N.Y. (John S. Martin, United States Attorney for the Southern District of New York, Gerard E. Lynch, Mark F. Pomerantz, Assistant United States Attorneys, of Counsel), for Appellee

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LUMBARD, Circuit Judge:

This appeal turns on whether defendants, charged with attempted extortion and conspiracy to extort, may assert, as a defense, that their demands for compensation for business losses caused by their intended victims were made in the reasonable belief that the victims owed them such compensation. We hold that the district court did not err in refusing to charge that such reasonable belief is a defense. The defendants, George Zappola and Robert Melli, were convicted in the Southern District of New York, Haight, *J.*, of attempted extortion in violation of the Hobbs Act, 18 U.S.C. §§1951 & 2 (1976) following a ten-day jury trial that ended on October 21, 1981. On December 11, 1981, the court sentenced Zappola to nine years imprisonment and Melli to six years. Finding no error, we affirm.

I.

George Zappola and Robert Melli owned and operated the M&R Repair Co. ("M&R"), which repaired containers for shipping companies at its lot in Newark, New Jersey. Its largest client was Japan Line, Inc., a large shipping company centered in Port Newark. In 1976 and 1977, the containers were delivered to M&R by World Trade, Inc., a trucking company owned by John Marano, William Ross, and Harold Hagy. At the direction of Japan Line, World Trade would move containers and container chassis to and from piers, railyards, and repair and depot facilities.

In early 1977, World Trade stopped delivering containers to M&R for repair work, and began sending

them to a competing shop, Maher Terminals. There is some evidence that the diversion of Japan Line containers was directed by Marano, whose son-in-law, Joseph DeNicholas, and former employee, Louis Fenza, both worked at Japan Line. Meanwhile, Marano surreptitiously approached Japan Line with a proposal to start a joint venture to do Japan Line's storage and repair work. He had previously discussed a joint venture with Zappola.

In May of 1977, Zappola began to notice the sharp drop in business in his yard. He called Marano to ask if he knew why containers were no longer being delivered to M&R and Marano replied that World Trade simply brought the containers wherever Japan Line directed.

On June 6, 1977, Marano received a call asking him and Ross to come to M&R. Marano and Ross went over to the M&R office, which was in a trailer in the M&R repair yard. Zappola and Melli were waiting for them in the back room. Zappola began cursing and yelling, accusing them of stealing his business by diverting containers to another facility. Zappola claimed that as a result he had lost $38,000. Pulling a gun on Marano, Zappola said, "You're the SOB that's doing it."

Marano denied the accusation, but Zappola was not appeased. He smashed Marano in the face, sending Marano's glasses flying and cracking a tooth. As Marano tried to stem the flow of blood from his mouth and nose, Zappola demanded that Marano and Ross make good M&R's losses from the diverted containers. Crying, pleading, Marano tried to explain that the decision to divert the containers was Japan Line's and he had nothing to do with it. Zappola called him a liar, firing the gun into the wall, and smashed Marano in the face again, almost knocking him out of the chair.

Before releasing Marano and Ross, Zappola turned to Melli and asked him to search the two to see if they were "wired," adding that if they were, "I'll kill them right now."

Satisfied that his message had been delivered, Zappola told the two to get out while they still could. "We'll be in touch," was his parting shot.

Marano reported this conversation to the FBI, with whom he had been cooperating in an unrelated matter. The FBI monitored Marano's future contacts with the defendants.

On Wednesday, June 22, 1977, Marano and Melli met at the Holiday Inn in Jersey City. Melli demanded that Ross and Marano pay him and Zappola $39,000 "by Friday" and implicitly threatened them with violence if they failed to pay up. He began with the claim that "we were fleeced thirty-nine six, by your business... Look, we're short thirty-nine thousand, six hundred dollars .... We got f***. We, wanna get paid."

Melli made it perfectly clear that he expected Marano and Ross to make good M&R's loss: "You got to the end of week to come up with it. . . .Give me that f*** money." Nor did he shy away from suggesting the consequences of not paying: "I'm not gonna argue with you. . . .I don't want to hear no for an answer. . . . If you're gonna pay, then we forget about it. I'm not going to take any more of it. There's nothing left to be said. . . .I don't have to prove to anybody I'm a tough guy. I know what I am."

Melli also noted that Zappola had not even wanted him to come and speak with Marano, and implied that he was doing Marano a favor by giving this last warning: "Georgie didn't even want me to come up and talk to you. He had in his head what he wanted to do. . . .He comes over there, there's no turning around." By contrast, Melli acted like a nice guy: "[I'm] gonna give you the courtesy to come down and say what I gotta say, and that's it." However, Melli was not negotiating, but delivering an ultimatum: "Once I finish, that's the end of it. I'm leaving it in your hands." If Marano and Ross wanted to "go into details, [they should] go see the other guy. Go see Georgie."

In the same conversation, Melli warned Marano to tell Ross to keep Ross' two sons away from the M&R yard, where they apparently had caused some trouble. "If he sends Gary and Roger over to that yard with an

attitude, he's gonna be the sorriest guy in this world. Those two f*** sons, they're gonna come back to him in sections. . . .If they wanna talk there like tough guys, we'll show 'em what tough guys are." Melli tied the threats to Ross' sons with the demands for the $39,000: "For their own good, keep them out of the yard. So, you give me the answer Friday. In the morning, call me up. If not, call Georgie up." And again: "They wanta come down and gorilla us? No way. We'll send them back in sections. Tell him I said so. John, I'm gonna leave. I'll hear from you Fri, ahh, tomorrow or Friday. You tell me yes, no."

Melli concluded with a thinly veiled threat: if Marano and Ross failed to pay by Friday, "Whoever's left will take care of it."

In the next few days Marano spoke three times on the phone with Zappola. Each time Zappola repeated his claim that Marano had stolen business from M&R. However, Zappola was very circumspect on the phone, making no outright threats or demands for money. He said things like, "I'm still not gonna sit still on it." "Don't mistake my kindness for weakness, John." But when Marano asked, "George, what's the bottom line? What do we do?" Zappola answered, "I don't know, John. I don't know." When Marano told Zappola that Melli had asked for $40,000 and complained that he couldn't raise that kind of cash, Zappola replied, "If you would have did it the right way I would have given you the shirt off my back."

Zappola, Melli, Marano, and Ross next met on Monday, June 27, 1977, at Ponte's Restaurant near the docks on New York's lower West Side. Zappola again claimed that Marano was responsible for M&R's losses, adding that "the clock was still running and now it's up to $42,000 that [Marano and Ross] owed him." Marano and Ross tried unsuccessfully to convince the defendants that they were not responsible for the diversion of the containers from M&R. As the meeting ended, Melli said, "It's $40,000 and we want it by Friday." Zappola added, "We'll be in touch."

Neither defendant took the stand at trial. The defense produced witnesses to support the claim that Marano was stealing M&R's repair business and to rebut the testimony that Zappola fired a gun in the M&R trailer.

II

The critical issue for the district court was the charge on wrongfulness. In the first trial of these defendants, Judge Sand, over government objection, charged that the jury must acquit if it found that the defendants reasonably believed they were legally entitled to the money they demanded from Marano and Ross. In spite of the favorable charge, the defendants were convicted on two counts each, but we reversed, holding it was error for the district court to rule that a potential witness was unavailable. 646 F.2d 48 (2d Cir. 1981). At the retrial, Judge Haight ruled in the government's favor on the issue of wrongfulness, holding in a memorandum opinion entered on September 29, 1981, that "unless a labor union is involved, the use or threat of force or violence brings the case within the Hobbs Act, and it matters not whether the defendant had, or believed he had, a right to the property which came into his hands as the result of such persuasion." Judge Haight declined to give the charge that Judge Sand had given, instead charging the jury as follows:

> [I]f you find that the government has proved beyond a reasonable doubt that a particular defendant used or threatened force or violence or attempted to induce fear for the prohibited purpose of obtaining money with his victim's consent, then the element of wrongfulness has been satisfied and in that circumstance it makes no difference whether the defendant was actually owed any money by the victims or thought he was. That is because the law does not permit the use or threat of force or violence or fear induced thereby to collect debts.

The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. §1951 (b)(2)(1976). The legislative history reveals that Congress meant to define extortion as it was defined by the states, in particular, New York. *United States v. French*, 628 F.2d 1069, 1073 (8th Cir.) *cert. denied*, 449 U.S. 1043 (1980). Said Rep. Hancock, "The bill contains definitions of robbery and extortion which follow the definitions contained in the laws of the State of New York." 91 Cong. Rec. 11900 (1945). Rep. Robsion agreed, and added that those were also the laws of the other 47 states: "The definitions of robbery and extortion set out in this bill are the same definitions set out in the New York State code of laws and are defined in substantially the same way by the laws of every State in the Union." *Id.* at 11906. As Congress meant to incorporate the law as it stood in 1945 of New York and her sister states, those laws are the proper starting point in determining whether extortion under the Hobbs Act encompasses the extraction by force and threats of property one believes to be one's own. Of course, we may presume that Congress was aware of the settled interpretations of the state laws of extortion to which it referred. *See, Int'l Union of Journeymen, Local 141 v. NLRB*, No. 80-2393, slip op. at 6 (D.C. Cir. April 16, 1982); *Air Transport Ass'n of America v. Professional Air Traffic Controllers Organization*, 667 F.2d 316, 321 (2d Cir. 1981).

By 1942, it was clear to this court that the New York courts no longer recognized a good-faith claim to the property as a defense to extortion. *United States v. Pignatelli*, 125 F.2d 643, 647 (2d Cir.), *cert denied*, 316 U.S. 680 (1942). A few years later, the New York courts expressly approved *Pignatelli's* view of New York law. *People v. Fichtner*, 281 App. Div. 159, 118 N.Y.S. 2d 392 (2d Dep't), *aff'd*, 305 N.Y. 864, 114 N.E. 2d 212 (1952). Nor did New York's sister states recognize any kind of good faith claim to the property as a defense to extortion. In *State v. Bruce*, 24 Me. 71 (1844), the court held:

> A person whose property has been stolen cannot claim the right to punish the thief himself without process of law, and to make him compensate him for the loss of his property by maliciously threatening to accuse him of the offense, *or to do an injury to his person or property, with intent to extort property from him.*

(emphasis added). *Accord, People v. Begg,* 178 Cal. 79, 172 P.152 (1918); *State v. Phillips,* 115 P.2d 418 (Idaho 1941); *Commonwealth v. Coolidge,* 128 Mass. 55 (1880); *In re Sherin,* 27 S.D. 232, 130 N.W. 761 (1911). We conclude that by adopting the states' statutory law of extortion, Congress meant to punish as extortion any effort to obtain property by inherently wrongful means, such as force or threats of force or criminal prosecution, regardless of the defendant's claim of right to the property.

Defendants' reliance on *United State v. Enmons,* 410 U.S. 396 (1973), is misplaced. In *Enmons,* the defendants fired high powered rifles at three transformers belonging to their employer and blew up a transformer substation in the course of a strike. By a 5-4 vote, the Supreme Court held that these acts did not constitute extortion under the Hobbs Act. Zappola and Melli argue that they are in the same position as the *Enmons* defendants — they used force in pursuit of a legitimate goal; in their case, the recovery of a debt, in *Enmons,* higher wages. However, we agree with the other circuits that have addressed this issue that *Enmons* merely carved out a labor exception to the traditional law of extortion codified in the Hobbs Act. *United States v. Pocaro,* 648 F.2d 753 (1st Cir. 1981); *United States v.French,* 628 F.2d 1069, 1075 (8th Cir.), *cert denied,* 449 U.S. 1043 (1980); *United States v. Warledo,* 557 F.2d 721, 728-30 (10th Cir. 1977); *see also United States v. Clemente,* 640 F.2d 1069, 1077 (2d Cir.) *cert. denied sub nom. Fiumara v. United States,* 102 S.Ct. 102 (1981)(fear of economic loss used to obtain property not belonging to defendants *held* extortion); *United States v. Cerilli,* 603 F.2d 415, 418-21 (3d Cir. 1979), *cert. denied,* 444 U.S.

1043 (1980) (solicitation of political contributions *held* not a lawful purpose similar to the seeking of higher wages in *Enmons*).

In *Enmons* the Supreme Court relied principally on the legislative history of the Hobbs Act indicating that Congress did not want to reach labor violence during a strike. A number of pro-labor Congressmen opposed the Hobbs bill on the ground that it could be used against unions engaged in strikes, boycotts, or other militant labor activity. In response, Rep. Michener said, "In my opinion this bill will not interfere with legitimate strikes. It is not so intended." 91 Cong. Rec. 11843 (1945). Rep. Sumners, another supporter of the bill, agreed: "There is nothing in this bill dealing with persons connected with organized labor as such." *Id.*

Rep. Celler, a staunch friend of labor and an opponent of the Hobbs bill, objected that the bill would make a federal crime out of every little bit of violence that occurs on a picket line: "It is unfortunately true that in some instances in the heat of labor disputes there will be minor altercations on the picket line. There will be occasional scuffles between partisans. Under the Hobbs Act bill every such altercation is automatically raised to the level of a Federal offense." *Id.* at 11901. Responding to these concerns, Rep. Sumners said, ". . .insofar as I understand this bill, there is not a thing in it to interfere in the slightest degree with any legitimate activity on the part of labor people or labor unions, unless somebody thinks it is legitimate for them to rob and extort." *Id.* at 11908. Added Rep. Jennings, "This does not have a thing in the world to do with strikes." *Id.* at 11912.

Relying on these and other comments, the Supreme Court held that "the Hobbs Act did not sweep within its reach violence during a strike to achieve legitimate collective-bargaining objectives." 410 U.S. at 404. As none of the legislative history on which the Court relied to reach this conclusion shed any light on the other contexts in which the Hobbs Act might be applied, we see no reason to extend *Enmons* to non-labor cases in derogation of Congress's express intent to incorporate the traditional state law of extortion.

The appellants place great weight on the Court's construction of the word "wrongfulness" in the Hobbs Act. Although the Court used broad language in stating that the word applied only where "the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to the property," 410 U.S. at 400, the Court applied this principle only to examples of union violence. It gave no examples where violence was employed outside the labor context to obtain property. Hence, we do not find this language applicable here, where two businessmen beat and threatened a third businessman to coerce the payment of an alleged debt. We conclude that the district court did not err in instructing the jury in accordance with the law of extortion as "the courts of the States of this country" understood it in 1945. 91 Cong. Rec. 11900 (1945) (remarks of Mr. Hancock).

III

The defendants' other claims of error in rulings of the district court are likewise without merit. Zappola asserts that the court erred in admitting Melli's June 22 conversation with Marano against him, arguing that his instructions to Melli not to speak to Marano (as reported by Melli to Marano) disassociated him from the threats Melli made there. However, the clear import of Melli's remarks were that Zappola had already made up his mind to use force and was not prepared to discuss the demand for money at all. Moreover, the jury need not have believed that Zappola ever told Melli not to speak with Marano.

Nor did the court err in refusing to redact Melli's threats against Ross's sons, as the jury could have found those threats were calculated to convince Marano and Ross that Melli was a "tough guy" who wouldn't hesitate to use force to back up his demands for money.

Finally it was not error to admit Marano's testimony that he had seen a handgun at Zappola's house six months before Zappola fired a handgun in Marano's

presence in the M&R trailer. As counsel argued that Zappola never threatened Marano with a handgun, such evidence was properly admitted as probative of his access to such a weapon. *See United States v. Robinson*, 560 F.2d 507, 513 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905 (1978). Nor can we say it was an abuse of discretion for the trial judge to find that the probative value of this evidence outweighed the risk of prejudice.

Affirmed.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing En Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 21st day of June, one thousand nine hundred eighty-two.

Nos.: 81-1488, 81-1490

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-v.-

GEORGE ZAPPOLA and ROBERT MELLI,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, George Zappola.

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
by:
/s/_____
Francis X. Gindhart, Chief Deputy Clerk

Appendix C
Opinion of United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SS79 Cr. 142-CSH

UNITED STATES OF AMERICA,
Plaintiff,

-v.-

GEORGE ZAPPOLA and ROBERT MELLI,
Defendants.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge

The Court decides in this opinion an issue concerning the proper jury charge to give, in a case where the Government accuses the defendants of attempted extortion under the Hobbs Act, 18 U.S.C. §1951. The Act reads in pertinent part:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by. . . extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section —
>
> • • •
>
> "(2) The term 'extortion' means the obtaining of property from another, with this consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

Defendants are charged in Count I with conspiring to extort, and in Count II with attempting to extort, money from World Trade Transport, Inc. "by the wrongful use of actual and threatened force, violence and fear." The Government's theory is that force and violence were actually used (defendant Zappola is alleged to have struck the president of World Trade Transport, Inc., one John Marano, in the face), and that threats of further force and violence were made. Defendants contend that whatever actions they took were motivated by their reasonable belief that World Trade Transport, Inc. owed defendants' company M&R Repair, Inc. money as the result of commercial transactions.

At the first trial Judge Sand charged the jury, over the Government's objections, that "if you find that the defendant you are considering reasonably entertained a belief that he had a lawful claim to the property or money, then his actions were not wrongful within the meaning of the statute, and you may not convict that defendant of attempted extortion." On remand, the Government again opposes that charge. The issue has been addressed by helpful letters and briefs of counsel, most recently in response to the Court's letter to counsel of September 16, 1981.[1]

I conclude, upon further consideration, that defendants were not entitled in law to the charge previously given.[2] It will not be repeated, either within the context of "wrongfulness" or of "intent." I construe the

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[1] The Court's letter expressed preliminary, not definitive, views and inquiries. It was written in the belief that counsel's arguments are better informed if counsel are made aware of the tentative workings of the judicial mind.

[2] I adhere to the view, previously expressed in the Court's September 16 letter, that the Court of Appeals addressed different issues in ordering a new trial in this case, and that its opinion does not foreclose the question under discussion in defendants' favor. Of course, I am not bound by Judge Sand's charge at the first trial, and may respectfully disagree with him without violating the law of the case. Cf. *Evans v. Calmar SS. Co.*, 534 F.2d 519, 521 (2d Cir. 1976).

Hobbs Act to proscribe the obtaining of property by force or violence, or by fear engendered by the threat of force or violence; and that a defendant's belief in his entitlement to the property does not constitute a legal defense.

With the sole exception of *United States v. Enmons*, 410 U.S. 396 (1973), whose special circumstances are considered *infra*, the parties cite no cases, and the Court has found none, where the use of inherently wrongful acts to obtain property has been excused by the actor's belief, or even the assumed fact, that he was entitled to it. On the contrary, a consistent line of authority points the other way; and for sound public policy reasons.

In *United States v. Pignatelli*, 125 F.2d 643 (2d Cir. 1942), defendant was convicted of violating a federal statute forbidding the use of the mails in furtherance of an extortion scheme. Specifically, the statute proscribed the mailing of any communication "addressed to any other person and containing any threat to injure the property or reputation of the addressee or of another..." The defendant, Ludovic Pignatelli, laid claim to the title of "Prince Pignatelli," as did his distant relative, Guido Pignatelli, who had had the good fortune to marry a wealthy widow named Henrietta Hartford. Disputes having arisen between Ludovic on the one hand, and Guido and his wife (now "Princess Pignatelli") on the other, Ludovic sought to obtain substantial amounts from these other individuals, and threatened, in a mailed communication which proved to be his undoing, that if his claims were not settled, he would refer to them in an autobiography he was writing, containing a chapter entitled: "Fakers' Titles in the U.S.A.," listing Guido and Henrietta among the fakers. At trial, Ludovic offered to show that, in fact, he had the sole right to the title of Prince. The Court of Appeals, affirming the conviction, held that this question of entitlement was irrelevant, and the evidence properly excluded. The Court reasoned that Ludovic's use of an explicitly

illegal means to enforce his perceived right branded him as an extortioner, entirely without regard to the existence *vel non* of that perceived right:

> "Threats to damage another's reputation are no proper means for determining a controversy. It may be adjusted either by suit or by compromise but settlement must not be effected by using defamation as a club. The threat to publish the book for such a purpose was unlawful and it made no difference whether Ludovic had the sole right to be called Prince or not. Consequently the evidence that he had a superior title was properly excluded." 125 F.2d at 646.

The court in *Pignatelli* found support in a New York State court decision, *People v. Eichler,* 75 Hun. 26 (26 N.Y.S. 998, 999, in which that court, construing a New York statute declaring it a crime to threaten a person with a criminal prosecution for the purpose of extorting money, said:

> "The fact that the person who in writing or orally makes such a threat for such a purpose believes, or even knows, that the person threatened has committed the crime of which he is threatened to be accused, does not make the act less criminal."

New York decisions are instructive because the legislative history of the Hobbs Act makes it clear that Congress, in drafting the statute, intended to adopt common law and statutory definitions of extortion, particularly as articulated in New York.[3] For that reason, I attach a particular significance to *People v. Fichtner,* 281 App.Div. 159 (118 N.Y.S.2d 392) (2d Dept. 1952), *aff'd* 305 N.Y. 864, 114 N.E.2d 212 (1952). Defendants were managers of a supermarket. Having detected a customer in the attempted theft of a jar of coffee, defendants threatened this individual with arrest and resulting adverse publicity, unless he paid the store $75,

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[3] See legislative history cited in Government's supplemental memorandum at 6.

and signed a paper admitting that during the course of several months he had unlawfully taken merchandise from the store in that amount. Defendants were charged under §§850 and 851 of the New York Penal Law. Section 850 provided: "Extortion is the obtaining of property from another. . .with his consent, induced by a wrongful use of. . .fear. . ." Section 851 provides that "fear, such as will constitute extortion," may be induced by a threat to accuse an individual of crime, or to expose him to disgrace. Defendants testified that they honestly believed that the individual had stolen merchandise of the value of $75 over a period of months. The trial court instructed the jury as follows:

> ". . .to accuse one of the crime of petit larceny or to impute disgrace to him may be lawful under certain circumstances; that where one steals a small amount of money and is threatened with prosecution if he does not return the money, that is a lawful threat because in such a case the intent would be to have the wrongdoer return the amount he owes; on the other hand, if one threatens to prosecute a person unless he pays an amount over and above what is rightfully due, and by such threat it is intended thereby to induce fear in that person, such a threat would be an unlawful threat to do an unlawful injury, and would constitute extortion; . . ." 118 N.Y.S.2d at 395-95.

Defendants appealed because the trial judge refused to give the following requested instruction:

> ". . .if in the judgment of the jury the defendants honestly believed that the amount which the complaint paid or agreed to pay represented the approximate amount of the merchandise which he or they had previously stolen from the Hill Supermarket, then the defendants must be acquitted." *Id.*

Affirming the decision, the Appellate Division held that not only was the requested charge inappropriate, the charge actually given by the trial court was wrong. The Appellate Division stated:

> "...the portion of the main charge to the effect that, under the circumstances of this case, extortion is committed only when one obtains property from another by inducing fear in that other by threatening to accuse him of crime unless he pays an amount over and above what was rightfully due was more favorable to defendants than that which they were entitled to receive. In our opinion, the extortion statutes were intended to prevent the collection of money by the use of fear induced by means of threats to accuse a debtor of crime, and it makes no difference whether the debtor stole any goods, nor how much he stole, and that defendants may properly be convicted even though they believed that the complainant was guilty of the theft of their employer's goods in an amount either equal to or less, or greater than any sum of money obtained from the complainant. Nor is defendants' good faith in thus enforcing payment of the money alleged to be due to their employer a defense." *Id.*

The New York State court in *Fichtner* specifically approved the view of the Second Circuit in *Pignatelli, supra,* 118 N.Y.S.2d at 398, and further observed:

> "The law does not authorize the collection of just debts by threatening to accuse the debtor of crime, even though the complainant is in fact guilty of the crime." *Ibid.*

Fichtner was cited by the Eighth Circuit in *United States v. French,* 628 F.2d 1069, 1075 (8th Cir. 1980), *cert. denied,* 101 S.Ct. 364 (1980), a Hobbs Act case, as one of several decisions standing for the proposition that:

> "Under state law the rule appears to be that one who takes money extortionately cannot defend on the basis that the money collected thereby was in satisfaction of a legitimate debt." *Id.* at 1075.

Discussion in the more recent decisions of the lower federal courts in Hobbs Act cases has centered upon the effect of the Supreme Court's decision in *Enmons, supra.*

Enmons held, in a five-four decision, that the Hobbs Act did not reach the use of violence by a labor union in its efforts to achieve legitimate union objectives, such as higher wages. In the course of its reasoning, the majority stated that:

> " 'Wrongful' has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." 410 U.S. at 400.

Defendants convicted of extortion have been relying upon that language ever since. None has succeeded, in view of lower federal courts' limitation of the *Enmons* rationale to the labor union context which gave it birth. See e.g. *United States v.Porcaro,* 648 F.2d 753 (1st Cir. 1981); *United States v. Cerilli,* 603 F.2d 415, 420 (3d Cir. 1979), *cert. denied,* 444 U.S. 1043 (1980); *United States v. French, supra; United States v. Warledo,* 557 F.2d 721, 729-30 (10th Cir. 1977). In *United States v. Clemente,* 640 F.2d 1059, 1077 (2d Cir. 1981), the Second Circuit clearly indicated its approval of the limitation placed upon the *Enmons* defense by the Third Circuit in *Cerilli.*

As in the case at bar, the defendants in *Warledo, supra,* and *Porcaro, supra,* were charged with extortion by the use or threat of physical violence to personnel and property of a railroad, in furtherance of what they asserted to be a lawful claim against the railroad. Defendants, relying upon *Enmons,* argued that "use of threats of violence or violence to obtain money from the railroad is not a violation of the Hobbs Act unless the illegal means were used to press an unlawful claim against the railroad." 557 F2d at 729. The Tenth Circuit refused to read *Enmons* so as to reach "this extreme conclusion"; affirming the convictions, the court stated at 730:

> "Accordingly, the trial court was not obliged to allow the appellants to explain at length their intentions in seeking money from the railroad through threats of violence or actual violence.

> Under the facts of this case that intent was not relevant to a showing that their activity was not 'wrongful' within the terms of the Hobbs Act."

In *Porcaro,* the defendants attempted to force certain individuals to pay money for the right to operate a sauna bath, or to vacate the sauna, using threats of physical harm and actual violence, at a time when those individuals had contractual rights to operate the facility. Again, defendants relied in the Court of Appeals upon the *Enmons* decision, seeking to portray themselves as acting in reliance on contractual rights they themselves had in the premises. The First Circuit refused to extend the *Enmons* rationale to such a situation. Quoting with approval from *Cerilli, supra,* the First Circuit in *Porcaro* said:

> We concur in this reading of Enmons, and find no basis for extending Enmons to protect from Hobbs Act prosecution the use of force and threats to resolve a contractual dispute among businessmen. Even assuming appellant had a legitimate claim to either the Reading sauna or the $50,000 sale price, his argument that Enmons' reasoning extends beyond labor disputes to eviction cases and the like is unpersuasive." 648 F.2d at 760.

The rationale of these cases, squarely applicable to the case at bar, is that unless a labor union is involved, the use or threats of force or violence brings the case within the Hobbs Act, and it matters not whether the defendant had, or believed he had, a right to the property which comes into his hands as the result of such persuasion. The First Circuit in *Porcaro* stated the proposition succinctly: a Hobbs Act prosecution will lie for "the use of force and threats to resolve a contractual dispute among businessmen."

In *Clemente, supra,* the Second Circuit defined the defendants' "wrongful purpose," sufficient to satisfy the Hobbs Act elements, as "obtaining money to which they had no lawful claim," 640 F.2d at 1078. Previously, the court approved Judge Sand's instruction to the jury

that "the wrongfulness element of the crime would be satisfied upon finding that fear of economic loss was employed by the defendants to obtain money to which they were not lawfully entitled." *Id.* at 1077. However, in *Clemente* the means of persuasion used was a fear of economic loss, resulting from the allocation or non-allocation of contracts; the court was obliged to deal with the defendants' contention that "the use of fear of economic loss is not inherently wrongful, but rather represents a device routinely used in legitimate business transactions," *id.* at 1077. Precisely because that was true, the Government was required in *Clemente* to prove that defendants had no lawful claim to the money which they obtained by means not inherently wrongful. The heart of the *Clemente* rationale lies in this sentence, at 1077:

> "Fear of economic loss is not an inherently wrongful means; however, when employed to achieve a wrongful purpose, its 'use' is wrongful."

In the case at bar, the defendants cannot be heard to argue that fear of physical force or violence "is not inherently wrongful." Because fear thus engendered *is* inherently wrongful, no purpose or objective may redeem it; and it is irrelevant that defendants were owed money by the victims of such fear, or "reasonably believed" that to be the case. The situation is entirely analogous to those presented in *Pignatelli* and *Fichtner, supra,* where the means used to obtain money were explicitly and unequivocally proscribed by the relevant statutes. Because that was so, those means were inherently unlawful; and the defendants' perceived rights to the property did not take the case outside the extortion statutes.

There is a symmetry to these propositions which appeals to public policy and common sense. Extortion consists of the use of wrongful means (force, violence, or fear thereof) to achieve an otherwise proper objective (satisfaction of a legitimate debt); *or* use of an otherwise proper means (fear of economic loss) to achieve a

wrongful objective (obtaining property to which there is no legal entitlement). The defendant's entitlement to the property in question is pertinent to the second category of case, illustrated by *Clemente;* but it is not pertinent to the first category, illustrated by *Porcaro, Warledo, Pignatelli,* and *Fichtner.*

This analysis reconciles all the cited cases. *Cerilli, supra,* as analyzed by the Second Circuit in *Clemente* at 1077, involved the inherently wrongful extortion of funds by public officers from contractors as a condition of doing business with the municipality; the defendants were not saved from Hobbs Act prosecution by the fact that the payments thus obtained were used for political contributions, an otherwise lawful objective. *Cerilli* thus falls within the first of the two categories summarized *supra; Clemente* falls within the second.

In *United States v. Arambasich,* 597 F.2d 609 (7th Cir. 1979), cited by the Court to counsel, the defendant was a construction worker whose brother, a union business agent, used his power to extort payments from contractors to avoid labor problems. On occasion, defendant's brother used those powers to require contractors to "hire" defendant. Defendant would appear at the job site and receive his pay, although he "seldom, if ever, did any work whatsoever." 597 F.2d at 610. The defendant's means of collection — a workman requesting compensation at a job site — was not inherently unlawful. In those circumstances, the trial judge appropriately charged the jury that to convict defendant under the Hobbs Act, the government had to show that defendant "received the payments from the company knowing that he was not legally entitled to receive them and knowing that they were made because the company feared economic harm." In short, *Arambasich* is a second category case.

Defendants cite *United States v. Poludniak,* No. 80-2133 (8th Cir., August 14, 1981). I do not see that the case assists them. In *Poludniak,* the prosecution lay not under the Hobbs Act, but under 18 U.S.C. §875(d),

which prohibits extortion by telephone calls, in language paralleling the mail extortion statute involved in *Pignatelli, supra*. The defendants, a niece of Senator Eagleton of Missouri and her attorney, threatened the senator and an officer of a company controlled by the Eagleton family with exposure to adverse publicity, in an effort to pressure the company to buy out the niece's interest. Defendants were permitted to testify — without government objection, so far as it appears — that they "both considered that they believed their activity was conducted in good faith without any criminal intent, in order to obtain money for Ms. Weigand's interest in Missouri Pipefittings after Thyson and Senator Eagleton had refused to deal with them on any other basis." Slip op. at 22. On appeal, defendants challenged the sufficiency of the Government's evidence on intent. Rejecting that contention, the Eighth Circuit said:

> "This argument also fails. Defendants both admitted doing all the acts cited by the government as 'overt acts' in furtherance of the conspiracy. There was no claim of accident or mistake; they admitted that they made the threats in order to get the money. It was for the jury to decide whether to believe that the defendants thought their actions were legal. The jury was correctly instructed on specific intent (defendants do not quarrel with those instructions), and defendant Weigand *had the additional advantage* of her advice-of-counsel argument. The jury was instructed that the government must prove that defendants acted willfully, with specific intent 'to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.' The jury was also correctly instructed that there is a presumption that every person knows what the law forbids, but that ignorance of the law is to be considered by the jury in determining whether or not the defendants acted or failed to act with specific intent. The jury had

ample opportunity to consider this issue and apparently rejected defendants' contentions. We will not disturb that verdict." Slip op. at 23.

The jury charge on intent approved by the court in *Poludniak* closely parallels Judge Sand's standard charge on the same subject given at the first trial (Tr. 738), as to which the Government makes no objection.

Counsel for Zappola argue that, even in a case where the means of obtaining property are inherently unlawful, a defendant's reasonable belief in entitlement constitutes a defense to a Hobbs Act prosecution. "If it were otherwise, then every ill conceived and unrealized demand for payment would be a potentially indictable offense under §1951." Bergman letter of September 23, 1981 at p. 2. This *in terrorem* argument does not withstand analysis. It is not "every ill conceived and unrealized demand" which falls within the first category of Hobbs Act cases, but only those demands which are asserted in an inherently unlawful manner, the use or threat of physical violence being an obvious example.

In sum, I construe the Hobbs Act to mean that you cannot beat someone up to collect a debt, even if you believe he owes it to you. For that reason, and in the light of the foregoing authorities, I will not give the charge which Judge Sand gave at the first trial of these defendants.

Dated: New York, New York
September 29, 1981

/s/_____
Charles S. Haight, Jr.
U.S.D.J.